(2) (1)

Nos. 83-2134 and 83-6876

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID N. BOCKOVEN, ET AL., PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

HARRIS J. GELBER, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Army "Relook Boards," created to reconsider for promotion Reserve officers previously considered by improperly constituted boards, unfairly narrowed the availability of promotion slots.

2. Whether promotion boards that contained 13% to 20% Reserve officer membership lacked an "appropriate number" of Reserve officers within the meaning of 10 U.S.C. (1976 ed.) 266(a).

3 Whether promotion board members' alleged knowledge that Reserve officers previously had been passed over for promotion by an improperly constituted board prejudiced the later promotion board proceedings.

4. Whether the court of appeals correctly rejected a claim for back pay that was raised for the first time on appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-26a)[1] is reported at 727 F.2d 1558. The opinion of the district court (Pet. App. 3a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1984 (Pet. App. 12a). A petition

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[1] "Pet. App." refers to the appendix in No. 83-2134.

for rehearing was denied on March 27, 1984 (Pet. App. 27a). The petitions for a writ of certiorari were filed on June 6, 1984 (No. 83-6876) and June 25, 1984 (No. 83-2134).

STATEMENT

1. At the time of the events underlying this litigation, Army officers serving on active duty, both Regular and Reserve, could obtain promotions to temporary rank in the Army of the United States. Periodically, officers were considered for such promotions by Army selection boards based on their service records. Officers eligible to be selected for temporary promotion were separated into two "zones of consideration," a primary zone for more senior officers and a secondary zone for more junior officers. Selection boards were limited as to the total number of officers they could select for promotion and were further limited as to the number of officers they could select from the secondary zone. Army regulations provided that a primary zone Reserve officer who was twice passed over for a temporary promotion would be released from active duty. Secondary zone officers who were not selected for promotion, however, were not considered "passed over" for purposes of release from active duty.[2]

This litigation arises out of the actions of two successive promotion selection boards constituted in

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[2] Following the enactment of the Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 *et seq.*, which became effective on September 15, 1981, the Army and the other military services generally discontinued use of this system of temporary and permanent ranks. The operation of promotion boards under the new system, however, is generally comparable to the prior system.

1974 and 1975. Fifteen percent of the selections in those years were secondary zone officers, the maximum percentage allowable; the remaining 85% were primary zone officers. The boards, however, failed to contain any Reserve officer membership despite the statutory requirement of 10 U.S.C. (1976 ed.) 266 that they contain an "appropriate number" of Reserves because they were considering the promotion of Reserve officers.

In response to complaints that the 1974 and 1975 determinations were invalid, the Secretary of the Army in 1976 convened selection boards containing Reserve officer membership in an effort to reconstruct the deliberations of the original 1974 and 1975 boards. These reconstituted boards (Relook Boards) reviewed the officers' records as they appeared at the time they were reviewed by the original boards and followed the same instructions and selection criteria provided to the original boards. Because those officers objecting to the determinations of the original boards were all primary zone officers, the Relook Boards reconsidered only primary zone officers, and the boards were authorized to select officers to fill only the 85% of the promotion slots that had originally been filled by primary zone officers.

The Relook Boards selected some officers who had been passed over by the original boards, but other officers were again passed over. Those officers selected by the Relook Boards were reinstated to active duty and treated as if they had been selected by the original boards; those passed over were treated as if they had been validly passed over by the original boards. See generally Pet. App. 13a-15a; *Doyle* v. *United States*, 599 F.2d 984, 988-990 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980).

2. Petitioners are Army Reserve officers who were separated from active duty on the basis of two successive passovers, in some cases by the 1974 and 1975 boards and in some cases by the 1975 and 1976 boards. They brought this action in the United States District Court for the District of Columbia, challenging their separations on the ground that the passovers were invalid. Specifically, petitioners alleged that the Relook Boards did not produce valid passovers because the number of promotion vacancies available was reduced from the total available to the original boards by eliminating the number of vacancies filled by the secondary zone officers selected by the original boards. In addition, those petitioners who were passed over by the 1976 promotion boards, which contained between one and three Reserve officers (see Pet. App. 21a), claimed that their 1976 passovers were invalid because: (1) their records before the 1976 promotion boards allegedly reflected, and were tainted by, passovers by the original 1975 boards; and (2) the Reserve membership did not satisfy the statutory requirement of an "appropriate number" of Reserve officers. Petitioners sought retroactive reinstatement to active duty, back pay and allowances in an amount not exceeding $10,000, and correction of their military records.

The parties filed cross-motions for summary judgment. On March 28, 1983, the district court issued an order denying petitioners' motion for summary judgment and granting the government's motion. In its opinion (Pet. App. 3a-11a), the court found that: (1) the Relook Boards' consideration of only the number of vacancies filled from the primary zone by the original boards did not affect its determinations and hence did not render passovers by these boards

invalid (*id.* at 5a-6a); (2) even assuming that some members of the 1976 selection boards were aware of prior passovers by the original 1975 boards, this was not material error because the board members presumably followed their oaths and their instructions not to consider prior passovers (*id.* at 6a-7a); and (3) the 1976 boards had an appropriate number of Reserve members (*id.* at 7a-11a).

The court of appeals affirmed, essentially for the reasons stated by the district court (Pet. App. 12a-26a). In addition, the court of appeals rejected the claim of certain petitioners to back pay for the period between their release from active duty after being passed over by the original 1974 and 1975 boards and the reconsiderations by the Relook Boards. The court held that petitioners had waived that claim by failing to raise it in the district court (*id.* at 25a-26a).

ARGUMENT

The decision of the court of appeals is correct. Moreover, because this case arises out of an isolated incident that occurred in 1974 and 1975 and involves a statute (10 U.S.C. (1976 ed.) 266) that has since been amended, the issues presented here are of little continuing significance. Accordingly, review by this Court is unwarranted.

1. Petitioners in No. 83-2134 contend (Pet. 1-2) that they were denied fair and adequate consideration for promotion because the Relook Boards did not have the opportunity to select them for vacancies originally filled by selections from the secondary zone. The court of appeals correctly rejected this claim, finding that petitioners received a "fair and complete opportunity to be considered for promotion in the manner intended by statute and regulation"

(Pet. App. 17a (quoting *Doyle* v. *United States*, 599 F.2d at 1004)). The Army's efforts to provide administrative relief for the error in the composition of the 1974 and 1975 promotion boards plainly were adequate despite the fact that primary zone officers did not have the opportunity to compete again for some of the 15% of the vacancies originally filled by the secondary zone promotions, which were not challenged. As the court of appeals found (Pet. App. 17a), petitioners have failed to give "any convincing reason for believing that if the relook boards had considered secondary zone officers, [their] chances for promotion would have been increased." As a practical matter, it is clear that the promotion boards were expected to select the maximum number of secondary zone officers permitted (*id.* at 6a, 18a). Thus, in the words of the district court (*id.* at 6a), petitioners' contention that reconsideration of the secondary zone vacancies would have made any difference is "hardly credible."

The procedure adopted by the Army was "reasonable and practical" and fully consistent with all relevant statutes and regulations (Pet. App. 17a). Especially in view of the well established principle that the courts should not lightly interfere with internal decisions of the military (see, *e.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953)), the courts below correctly refused to invalidate the determinations of the Relook Boards because of the speculative possibility that another officer might have been promoted if the Army in its discretion had tailored the administrative remedy differently. See also *Jones* v. *Alexander*, 609 F.2d 778 (5th Cir.), cert. denied, 449 U.S. 832 (1980).

2. Petitioners contend (83-2134 Pet. 17-18; 83-6876 Pet. 4-11) that the 1976 regular promotion

boards did not contain an "appropriate number" of Reserve members because the Reserve membership was not roughly proportionate to the percentage of Reserves considered by the boards. At the outset, we note that this issue is of no continuing significance. The statute in question, 10 U.S.C. 266, was amended in 1981 to provide that the covered promotion boards must "include at least one member of the Reserves, with the exact number of Reserves determined by the Secretary concerned in his discretion." Thus, if promotion boards identical in composition to the 1976 boards were constituted today, there could be no doubt that they would satisfy the statutory directive. Resolution of the question presented here therefore will have no effect except in cases involving old promotion boards and the predecessor statute. In any event, the court of appeals correctly held that the 1976 boards satisfied the "appropriate number" criterion of the earlier statute.

Following extensive examination of the legislative history, the court of appeals found that Section 266 did not impose a rigid proportionality requirement, but instead gave the Secretary of the Army "extremely broad discretion" to determine what constitutes an "appropriate number" of Reserves to serve on a promotion board (Pet. App. 22a). Petitioner Gelber contends (83-6876 Pet. 5-9) that, despite the discretionary language of the statute, the committee reports demonstrate that Congress intended to impose a "roughly proportional" requirement on Reserve officer membership. The court of appeals fully considered and rejected this contention. The court explained that the conference committee report stated that a later amendment giving the service secretaries authority to prescribe the appropriate number of Reserve officers on the boards

was intended to "provide more flexibility" in this regard. The court correctly held that the evidence in the conference report, along with the plain language of the statute, predominated over the precatory language in earlier committee reports suggesting that the proportion of Reserves should be "roughly equal." Pet. App. 23a-24a; see H. R. Rep. 2445, 82d Cong., 2d Sess. 32-33 (1952). Accord, *Teeter* v. *Marsh*; Civ. No. 80-2670 (D.D.C. Feb. 29, 1984), appeal pending, No. 84-5200 (D.C. Cir. filed Mar. 30, 1984), and *Poklemba* v. *Marsh*, Civ. No. 80-2715 (D.D.C. Feb. 29, 1984), appeal pending, No. 84-5209 (D.C. Cir. filed Mar. 30, 1984) (appeals transferred in both cases to Federal Circuit July 10, 1984). It would serve no purpose for this Court further to plumb the legislative history of this superseded version of 10 U.S.C. 266.

Both petitioners claim (83-2134 Pet. 17-18; 83-6876 Pet. 9-11) that the decision below conflicts on this point with *Stewart* v. *United States*, 611 F.2d 1356 (Ct. Cl. 1979). Even if that assertion were correct, it would provide no basis for review by this Court, because the court below is the successor to the Court of Claims and hence petitioners are alleging no more than an intracircuit conflict. In fact, however, there is no conflict between *Stewart* and the decision below.

In *Stewart*, the Court of Claims considered a promotion board that contained one Reserve officer out of 25 members. The court intimated that this composition did not satisfy the statutory requirement, although it made no final decision pending administrative action. Plainly, this ruling has no bearing here, where the percentage of Reserve officer membership on the challenged boards varied from 13.3% to 20%. Petitioners apparently rely on language in *Stewart*

quoting approvingly the Senate Report on 10 U.S.C. (1976 ed.) 266 and suggesting that the statute required "rough equality" (see 611 F.2d at 1359), but the court below found that suggestion to be dictum and emphatically rejected it. There is no reason for this Court to second-guess the court of appeals' reading of its own precedent.

3. Petitioners in No. 83-2134 also claim (Pet. 2, 18-19) that certain of them were denied fair and equitable promotion consideration because the 1976 promotion boards allegedly were aware of their passovers by the improperly constituted 1975 boards.[3] Both courts below assumed arguendo that the 1976 promotion boards did know of petitioners' passovers by the improperly constituted 1975 boards, but held that the 1976 determinations were unaffected by that knowledge, given that all members of the boards had taken special oaths to comply with direct orders not to consider such information (Pet. App. 7a, 19a-20a). The court of appeals found no basis for rejecting the district court's conclusion that "highly trained and disciplined Army officers should be presumed to have followed direct orders to disregard any information not properly before them in making their selection decisions." See *Rogers* v. *United States*, 270 U.S. 154, 161 (1926) (it could be presumed that a military classification board did not consider evidence that the board of inquiry, whose decision it was reviewing, was instructed to

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[3] Some of the files provided to the boards may have contained documents bearing a code symbol indicating—to someone who understood the code—that the officer had been considered by a previous board (see Pet. App. 6a-7a).

disregard). Petitioners do not even attempt to suggest how the court of appeals erred on this issue.[4]

4. Petitioners in No. 83-2134 argue (Pet. 19-20) that they should be permitted to pursue an alternative claim to back pay from the date of separation until the date of final action by the Relook Boards. They offer no explanation for failing to identify this claim in their complaint, however, and therefore there appears to be no basis for affording such relief. The court of appeals held that, since petitioners did not raise this claim before the district court, it would not consider the issue (Pet. App. 26a). This ruling is consistent with standard practice in the courts of appeals and with the rule applied by this Court. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

5. Pointing to the fact that a number of cases are still pending involving issues arising out of the decisions of the 1974-1976 promotion boards, petitioners in No. 83-2134 contend (Pet. 13-17) that the Court should grant certiorari to resolve a conflict between the decision below and *Dilley* v. *Alexander*, 603 F.2d 914 (D.C. Cir. 1979). This contention is without merit.

First, while it is true that some of the petitioners are similarly situated to the *Dilley* plaintiffs yet did

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[4] Petitioners do allege (82-2134 Pet. 18-19) that the court of appeals' decision on this issue conflicts with *Horn* v. *United States*, 671 F.2d 1328 (Ct. Cl. 1982). *Horn*, however, did not consider a situation in which promotion board members had sworn not to consider particular information—the fact that formed the basis for the decision below. Moreover, to the extent there is any tension between this case and *Horn*, that is an intracircuit matter not warranting this Court's review.

not receive the same relief, it is not clear that there is a genuine conflict between the two decisions. The court of appeals in this case observed that, although the *Dilley* court had found the Army procedures defective because of the failure to reconsider secondary zone vacancies and the 1976 board members' possible awareness of passovers by the original 1975 boards, there was no indication that the *Dilley* court had considered the factors that the court below found decisive, *i.e.*, the absence of any likely practical effect of reconsidering secondary zone vacancies and the special instructions and oaths taken by the board members (see Pet. App. 18a, 20a). Thus, if another case like this one were to come before it, there is no assurance that the District of Columbia Circuit would reach a result different from that reached below.

At all events, any conflict between the court below and the District of Columbia Circuit is of no continuing significance. Under the Federal Courts Improvement Act of 1982, the Federal Circuit has exclusive appellate jurisdiction over military pay claims under the Tucker Act. See 28 U.S.C. 1295 (a) (2). All subsequent cases raising these issues will be governed by the precedent in this case.[5] Therefore, the alleged conflict with *Dilley* will not give rise to any disparate results in the future, and there is no need for this Court to resolve it.

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[5] All pending trial level cases cited by petitioners (83-2134 Pet. 14-15 n.8) are Tucker Act suits before the United States Claims Court and are therefore governed by Federal Circuit precedent. *Teeter* v. *Marsh*, No. 84-5200, and *Poklemba* v. *Marsh*, No. 84-5209, which petitioners list (83-2134 Pet. 15 n.8) as pending in the District of Columbia Circuit, have been transferred to the Federal Circuit in light of 28 U.S.C. 1295(a)(2). See App., *infra* 1a-2a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CA 80-02670

No. 84-5200

MAJOR WILLIAM JAMES TEETER, ET AL., APPELLANTS

v.

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY, ET AL.

And Consolidated Case No. 84-5209

[Filed Jul. 10, 1984]

Before: Tamm, Edwards, and Starr *, Circuit Judges

ORDER

Upon consideration of appellees' motion to transfer and of appellants' opposition thereto, it is

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* Circuit Judge Starr did not participate in the foregoing Order.

ORDERED by the Court that the motion is granted. The Clerk is hereby directed to transfer these consolidated appeals to the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1631. Appellants below sought retroactive reinstatement to active duty status, and "an award of active duty pay and allowances from the date of their release to the date of the judgment." As noted by the district court in its memorandum opinion of August 29, 1983, the district court's jurisdiction over this latter claim was, of necessity, dependent upon 28 U.S.C. § 1346(a)(2). As a result, this court lacks jurisdiction over these consolidated appeals. *See* 28 U.S.C. § 1295(a)(2). It is

FURTHER ORDERED that the Clerk is directed to send a copy of this Order to the District Court.

Per Curiam

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